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In The

# Supreme Court of the United States

October Term, 1993

TICOR TITLE INSURANCE COMPANY, ET AL.,

*Petitioners,*

v.

WALTER THOMAS BROWN AND JEFFREY L. DZIEWIT,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## BRIEF OF JAMES MENENDEZ, MARVEL STRAUB AND HERMAN MYERS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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## INTEREST OF *AMICI*[1]

Amici James Menendez, Marvel Straub, and Herman Myers are Illinois residents and absent class members in a nationwide "limited fund" class action pending in federal court in Tyler, Texas. *Ahern v. Fibreboard Corp.*, Civil Action No. 6:93cv526 (E.D.Tex., filed Sept. 9, 1993). The defendant in the class action, Fibreboard, with its insurers, orchestrated the filing and simultaneous settlement of the action in order to force resolution of all claims for asbestos-related personal injuries in the single forum in Texas. Amici each have personal injury claims against Fibreboard and other manufacturers which they wish to pursue separately in the Illinois courts; they do not approve of the terms of the proposed class action settlement and do not wish to litigate their claims or objections in the distant federal forum. But because the *Ahern* action was brought as a mandatory class action under Rule 23(b)(1)(B) of the Federal Rules of Civil Procedure, neither amici nor any other absent class members will be permitted to exclude themselves from the class.

Two of the settling parties in the *Ahern* case, Pacific Indemnity Company and Continental Casualty Company, joined by the American Insurance Association, have filed an amicus curiae brief urging the Court to tailor its decision in the case at bar to preserve the ability of the federal courts to resolve individual claims for personal injury damages through mandatory "limited fund" class actions.

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[1] Pursuant to Rule 37 of the Rules of this Court, amici have obtained the consent of petitioners and respondents to file this brief. The parties' letters of consent have been filed with the Clerk of the Court.

In their brief, these insurance companies seek this Court's approval of the "limited fund" class action procedure on policy grounds, touting the alleged efficiency of such actions while urging the Court to accord little or no weight to the right of victims of tortiously-inflicted injuries to individual determination of their damage claims in a convenient forum.

Amici's purpose in submitting this amicus curiae brief is two-fold.[2] First, amici ask the Court to approve the Ninth Circuit's holding, based on this Court's unequivocal language in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), that a class action cannot adjudicate the claims for money damages of persons who have no minimum contacts with the forum state, without providing such persons with a right to exclude themselves from the action. Second, although the issue should not be addressed at all in this case because it is not implicated on these facts and has not been raised by the parties, amici write to refute the insurance industry's suggestion that "limited fund" class actions that deny absent class members the right to exclude themselves from the class

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[2] At the outset, however, amici respectfully suggest that the Court should not decide this case at all, because the dispute between the petitioners and respondents has been settled, as the parties informed the Court in their joint letter of October 1, 1993. Even if the case is not technically moot due to the necessity of district court approval of the settlement, the lack of sufficient adversity of interest among the parties, and the far-reaching implications of the constitutional questions raised in the case, strongly counsels this Court to use its discretion to dismiss the writ as improvidently granted.



provide a practical, constitutionally permissible way to resolve mass tort cases.

## SUMMARY OF ARGUMENT

*Phillips Petroleum Co. v. Shutts* should be interpreted to support the Ninth Circuit's holding that, absent consent, neither state nor federal courts may exercise personal jurisdiction over litigants who lack minimum contacts with the state in which the court sits. The extent of due process protections afforded litigants should not depend on whether a claim has been filed in a state court, or at the federal courthouse across the street. The concept of "fair play and substantial justice" imbedded in the Due Process clause of the Fourteenth Amendment, which limits the exercise of personal jurisdiction by state courts, also guides Fifth Amendment limitations on the exercise of federal court jurisdiction. While minimum contacts with state territorial boundaries may not in every case fully address concerns implicated by "fair play and substantial justice," state boundaries provide reasonably bright lines by which to determine whether a court has exceeded its constitutionally authorized jurisdiction. Alternatively, if state territorial boundaries do not limit the exercise of federal court jurisdiction, federal courts must apply some balancing test to ensure that litigants are not unfairly treated by having their rights adjudicated in a distant forum. Moreover, amici point out in Part I(B) that, although the present case involves claims brought under a federal statute, when considering limits on the exercise of federal court jurisdiction over absent class

members with state law claims within the diversity jurisdiction of federal courts, this Court must consider constitutional federalism concerns. Even if the Fifth Amendment allows a federal court to exercise personal jurisdiction over plaintiffs with federal claims who lack minimum contacts, federal courts owe a constitutional obligation of comity to the states which limits their jurisdictional authority to bind class members with state law claims to the bounds of state court jurisdiction.

In response to the amicus brief of the American Insurance Association, et al., amici note in Part II that the "limited fund" class action device should never be used to resolve mass tort litigation. Rule 23(b)(1)(B) was not intended to apply to situations involving a defendant facing potential insolvency from *in personam* liabilities arising out of a mass tort. The types of "limited fund" which justify certification under this provision consist of identifiable, finite assets in which all class members have a preexisting interest. Furthermore, application of Rule 23(b)(1)(B) to mass tort cases would violate the Constitution's overriding principles of separation of powers and federalism, as well as the Rules Enabling Act, by abridging the substantive rights of mass tort victims. Absent statutory authorization, federal courts are not constitutionally empowered to modify substantive rights by distributing only *some* of a defendant's assets on a pro rata basis to tort creditors, whose judgments entitle them to reach *all* of the defendant's assets. Finally, adjustment of the rights of mass tort victims via the class action device, while leaving intact the rights of the defendant's other creditors, denies those victims equal protection of the laws as guaranteed under the Fifth Amendment.



## ARGUMENT

### I. ABSENT CONSENT, A FEDERAL COURT MAY NOT EXERCISE PERSONAL JURISDICTION OVER CLASS MEMBERS WHO LACK MINIMUM CONTACTS WITH THE STATE IN WHICH THE COURT SITS.

In *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), this Court established that a court wishing "to bind an absent plaintiff concerning a claim for money damages or similar relief at law . . . must provide minimal procedural due process protection." 472 U.S. at 810. Such minimal protection must include "notice plus an opportunity to be heard and participate in the litigation, whether in person or though counsel . . . [and] an opportunity [for the absent plaintiff] to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court." *Id.*

The due process right of absent class members to exclude themselves from actions involving money damages recognized by the Court in *Shutts* is based on two related interests of absent class members: their interest in controlling their inherently particularized claims for damages, and their interest in avoiding the involuntary adjudication of their damages claims by a distant forum. Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After* Phillips Petroleum Co. v. Shutts, 96 YALE L.J. 1, 52-57 (1986). The role of opt out rights in protecting the due process interest of individuals in controlling their own damages claims is set out in the *amicus curiae* briefs in support of respondents filed by Trial Lawyers for Public Justice and Public Citizen. In this brief, amici Menendez, Straub and Meyers explain

that the interest of absent class members in avoiding involuntary adjudication of their damages claims by a distant forum similarly requires protection by recognition of the right to opt out.

### A. The Due Process Clauses of Both the Fifth and Fourteenth Amendments Protect Individuals' Interest in "Fair Play and Substantial Justice," Which Do Not Change as a Result of the Court in Which the Lawsuit Is Pending.

In *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945), this Court established that due process restrains state courts from exercising jurisdiction over defendants in a manner that would "offend traditional notions of fair play and substantial justice." Thus, the relationship between the forum and the litigant whose rights are being affected without consent must be such that an adjudication in that forum would be reasonable. 326 U.S. at 317. This Court has consistently reiterated this principle in defining the due process limits of state court jurisdiction. *See, e.g., World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980); *Insurance Corp. of Ireland, Ltd. v. Compagnie Des Bauxites de Guinea*, 456 U.S. 694, 702-03 (1982); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476-77 (1985).

If deciding a litigant's rights in a distant state court would offend notions of "fair play and substantial justice," so would adjudication of those rights in a federal court sitting in the same distant state. Due process limits on personal jurisdiction are intended to protect parties



against "the burdens of litigating in a distant or inconvenient forum." *World-Wide Volkswagen*, 444 U.S. at 292. Such burdens are identical in cases brought in the same locality, whether those cases are pending in state or federal courts. *See GRM v. Equine Investment and Management Group*, 596 F.Supp. 307, 314 (S.D. Tex. 1984) (noting that notions of "fair play and substantial justice" are the same under the Due Process Clauses of both the Fifth and Fourteenth Amendments). As two commentators have written following *Shutts*:

> it seems difficult to justify due process differences affecting notice and opt-out protection provided by *Shutts* when the alternative is to bind nonconsenting litigants by adjudication in forums with which they have no affiliation. The disadvantages of distant forum abuse are not mitigated by the forum's federal rather than state character.

Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After* Phillips Petroleum Co. v. Shutts, 96 YALE L.J. 1, 30-31 (1986). Lower federal courts have consistently applied the jurisdictional aspect of the *Shutts* holding to class actions brought in federal courts. *See Carlough v. Amchem Products, Inc.*, No. 93-1482, 1993 WL 492511, at *7 (3d Cir. Dec. 1, 1993) (noting that absent plaintiffs who lack minimum contacts with Pennsylvania must be allowed the right to opt out of a federal class action brought in the Eastern District of Pennsylvania); *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 292 (2d Cir. 1992) ("*Shutts* mandates that a plaintiff be permitted to opt out of a proposed class when the court does not have personal jurisdiction over the plaintiff"); *In re Real Estate Title & Settlement Services Antitrust*

*Litigation*, 869 F.2d 760, 766 (3d Cir.), *cert. denied*, 493 U.S. 821 (1989) ("*Shutts* stands for the proposition that a court can bind all members of a plaintiff 'opt out' class to a judgment for damages even if the class members do not meet the traditional requirements of *in personam* jurisdiction"); *Waldron v. Raymark Indus., Inc.*, 124 F.R.D. 235, 238 (N.D.Ga. 1989) (holding that the *Shutts* language "would be equally applicable to federal courts seeking to exercise personal jurisdiction over plaintiffs with insufficient minimum contacts with the forum to support personal jurisdiction"). The minimum contacts test provides a reasonable easily applied bright line understood by both state and federal courts.[3] Even if this Court rejects minimum contacts with state boundaries as setting the appropriate constitutional limit on the exercise of federal court jurisdiction, due process nonetheless mandates that a party's interest in "fair play and substantial justice" be protected:

> If due process is to have any application at all in federal cases – and the Fifth Amendment requires that it does – it seems impossible that Congress could empower a plaintiff to force a defendant to litigate any claim . . . in whatever forum the plaintiff chooses, regardless of the burden on the defendant.

4 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, FEDERAL PRACTICE & PROCEDURE § 1067.1 at 328-29

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[3] Because Federal Rule of Civil Procedure 4(e) limits the exercise of jurisdiction of federal courts to the jurisdictional reach of the state court in which it sits, federal courts regularly conduct minimum contacts analysis under state long-arm statutes.



(1982). It seems equally impossible that due process would allow a federal court to exercise jurisdiction over an absent class member against that person's wish, no matter how far the federal court is from the absent plaintiff's residence. Thus, this Court should alternatively adopt an *ad hoc*, fairness approach to the exercise of federal court jurisdiction, which would allow a federal district court to assert personal jurisdiction over an unwilling litigant only when fair under the circumstances. *See Handley v. Indiana & Mich. Elec. Co.*, 732 F.2d 1265 (6th Cir. 1984); *Horne v. Adolph Coors Co.*, 684 F.2d 255 (3d Cir. 1982); *Kinsey v. Nestor Exploration Ltd.*, 604 F.Supp. 1365, 1373 (D.C. Wash. 1985).

### B. Federalism Constraints Implicit in the Fifth Amendment Demand That Federal Courts Sitting in Diversity Not Assert Jurisdiction over Distant Plaintiffs.

Finally, amici must point out that, whatever decision the Court makes with respect to the exercise of personal jurisdiction in this case, state law claims brought under the diversity jurisdiction of the federal courts implicate separate federalism concerns militating against the exercise of federal court jurisdiction over absent plaintiffs who lack minimum contacts with the state in which the court sits. When sitting in diversity, federal courts are bound by the constraints of state law, and the entire lawsuit implicates only local interests. Although there are unquestionably national interests in the enforcement of federal antitrust or securities laws, Congress has not seen fit to create substantive tort laws supplanting those developed by the states. Enforcement of those laws is

thus a paramount *state* interest, and it should, absent the consent of the litigants, take place in a local forum in which the litigants reside. Application of the minimum contacts test in the context of the exercise of federal court jurisdiction over absent class members with state law claims is therefore mandated by both the state sovereignty concerns and personal liberty guarantees embraced in the Constitution. *See World-Wide Volkswagen*, 444 U.S at 293 (the constitutional limits of a court's jurisdictional power must "remain faithful to the principles of interstate federalism embodied in the Constitution").

## II. LIMITED FUND CLASS ACTIONS MAY NOT APPROPRIATELY BE USED TO RESOLVE MASS TORT LITIGATION

The concerns of amici addressed in the discussion below are related to the propriety of using the "limited fund" class action as a device to resolve mass tort cases, which is an issue that is unquestionably *not* presented in this case. There has never been any allegation of a limited fund by any of the parties in this case or in the earlier class proceeding in MDL 633, and thus both Petitioners and Respondents have wisely chosen not to brief the issue of whether the Ninth Circuit's holding should extend to such actions.[4]

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[4] Petitioners do, however, acknowledge in their brief that "Rule 23 currently does not permit mandatory class actions" in "mass tort cases in areas like asbestos." Brief for Petitioners at 27.



Amici include this discussion of limited fund classes solely to respond to the amicus brief filed by the American Insurance Association, et al. in support of Petitioners, which argues extensively regarding this inapposite issue. Amici strongly urge the Court not to address the issue at all here, without briefing and argument by the parties, given both the complexity of the constitutional and statutory questions implicated and the political controversy surrounding resolution of mass tort cases. However, to ensure that the Court receives a balanced view of the subject, amici briefly explain below why limited fund class actions should not and cannot, within the bounds of the Constitution, be used to extinguish the rights of mass tort victims.

In a transparent effort to secure judicial legislation redefining the rights of mass tort victims, defendants have recently embraced "limited fund" class settlements as "a more equitable means" to resolve mass tort cases. Brief for the American Insurance Association, Continental Casualty Company and Pacific Indemnity Company as *Amici Curiae* in Support of Petitioners (hereinafter "AIA Brief"), at 7-8. Although such actions involve no identifiable res which a court can allocate to claimants on a pro rate basis, by "settling" the action the defendant creates such a fund, which acts to cap the total aggregate recovery for victims of a particular mass tort. This manipulation of Rule 23 is designed to alter the substantive rights of mass tort victims while leaving intact the defendant and its other creditors. Such an abuse is absolutely at odds with both the rule itself and our federal Constitution.

### A. Rule 23(b)(1)(B) Does Not Apply to Cases Involving the Potential Insolvency of a Defendant as a Result of Tort Litigation.

Federal Rule of Civil Procedure 23(b)(1)(B) provides that an action may be maintained as a class action if the prerequisites of subdivision 23(a) are satisfied and:

> the prosecution of separate actions by or against individual members of the class would create a risk of . . . adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

Fed.R.Civ.P. 23(b)(1)(B). This provision was primarily intended to allow for class adjudication of multiple claims against a "limited fund." *See Rules Advisory Committee Notes to 1966 Amendments to Rule 23*, 39 F.R.D. 69, 101 (1966) (noting the appropriate use of classes certified under this subsection "when claims are made by numerous persons against a fund insufficient to satisfy all claims"). A limited fund is "a fixed asset or piece of property . . . in which all class members have a preexisting interest. . . . Classic illustrations include claimants to trust assets, a bank account, [life] insurance proceeds, company assets in a liquidation sale, [and] proceeds of a ship sale in a maritime accident suit." 1 Herbert B. Newberg & Alba Conte, NEWBERG ON CLASS ACTIONS § 4.09 at 4-32-33 (3d ed. 1992).

The potential insolvency of a defendant due to lawsuits arising out of a mass tort does not create a "limited fund" sufficient to certify a class under Rule 23(b)(1)(B).



In the mass tort situation, the defendant has unlimited *in personam* liability for the injuries alleged, rather than having its liability limited by the amount of a particular identifiable res that can be tendered to the court, such as a trust fund, bank account, or life insurance proceeds. Rule 23(b)(1)(B) was designed to allow a court to distribute a limited amount of money among eligible claimants on a pro rata basis, but such a distribution is impossible without a specific, identifiable fund. Unlike judgments from claims against a bank account or trust fund, a judgment in a tort claim entitles the victim to reach *any* of the defendant's assets. Rule 23 does not empower federal courts to reduce *in personam* judgments on a pro rata basis by setting some arbitrary limit on the percentage of the defendant's assets that should be available to victims of a particular mass tort. Under the Constitution, such an alteration of substantive rights is exclusively within the power of Congress, which has allowed for pro rata distribution of a defendant's assets only in very particular circumstances when accompanied by a plethora of procedural safeguards, which are set out in the United States Bankruptcy Code. Rule 23(b)(1)(B) was never intended as a substitute for bankruptcy, and the use of limited fund class actions in mass tort cases by the judiciary impermissibly invades the constitutional authority of Congress.

### B. Article III Courts May Not Constitutionally Adjust the Substantive Rights of Tort Victims Merely Because a Defendant May Lack Sufficient Assets To Pay the Claims Asserted Against It.

In upholding the diffusion of responsibilities mandated by the Constitution's separation of the powers of

government, this Court "consistently [has] emphasized that the federal lawmaking power is vested in the legislative, not the judicial, branch of government." *Northwest Airlines, Inc. v. Transport Workers Union of Am.*, 451 U.S. 77, 95 (1981). In the context of state law tort actions brought in federal court, the judiciary's function is further limited by federalist principles of comity to state lawmaking authorities. Congress embraced these dual constitutional principles in passing the Rules Enabling Act, 28 U.S.C. § 2072, which prohibits this Court from enacting rules of procedure which "abridge, enlarge or modify any substantive right." As Professors Wright, Miller, and Cooper explain in discussing this provision:

> The mere fact . . . that Congress has the constitutional power to formulate substantive law in areas of federal concern does not in itself give the federal judiciary an equal power, and certainly no such judicial power could reasonably be inferred from the grant of authority to the Supreme Court to prescribe general rules of practice and procedure. When matters of state substantive law are at issue, principles of federalism – which command that substantial deference be given to the ways in which the states have seen fit to structure social relationships in areas of state competence – are also implicated.

19 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, FEDERAL PRACTICE AND PROCEDURE § 4509 at 140 (1982).

Application of Rule 23(b)(1)(B) to mass tort cases violates constitutional separation of powers and federalism principles, as well as the Rules Enabling Act, by



abridging the substantive state law rights of tort claimants. *See Piambino v. Bailey*, 610 F.2d 1306, 1331 (5th Cir. 1980) (Rule 23 is merely a procedural rule and does not create any rights or remedies). The only arguably possible source of a "limited fund" which might allow for certification of a (b)(1)(B) class in the mass tort context is the potential insolvency of the defendant. If under Rule 23 the risk of insolvency in fact permits certification of a limited fund class, the relevant fund would have to consist of *all* of the assets of the potentially insolvent defendant, which the court would theoretically distribute pro rata among class members if the eventual class judgment exceeded the worth of those assets. The claimants would thus be awarded less than what their claims entitled them under the relevant substantive tort law.

The separation of powers problem in this context is underscored by the existence of the Bankruptcy Code, a comprehensive remedial scheme enacted by Congress to deal with exactly the type of problem which the AIA Brief contends should be solved via Rule 23(b)(1)(B). When Congress has articulated the law governing the resolution of a particular question, a court must apply the federal statute that controls the issue and may not fashion some other law to resolve the controversy. *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22, 27 (1988); *Northwest Airlines, Inc. v. Transport Workers Union of Am.*, 451 U.S. 77, 95-96 n.34 (1981). If a party's debts, including judgments against it, exceed its assets, then either the debtor or its creditors may seek to alter the substantive rights of the creditors under the provisions of the Bankruptcy Code, which provides debtors a "fresh start," *Grogan v. Garner*, 498 U.S. 279, 286 (1991), while also providing significant

protections for creditors. Article III courts have no authority to undertake the same alteration of substantive rights absent statutory authorization. In a very recent decision reversing a limited fund class certification based on the potential insolvency of an asbestos defendant, the Second Circuit emphasized that such an adjustment of creditors' rights is not the appropriate role of the judiciary, whether or not the class action might be "more efficient" than bankruptcy: "the function of the federal courts is not to conduct trials over whether a statutory scheme should be ignored because a more efficient mechanism can be fashioned by judges." *Keene Corp. v. Fiorelli*, No. 93-7712, 1993 WL 497538, at *6 (2d Cir. Dec. 1, 1993) (motion for rehearing and suggestion for rehearing en banc pending).

Certification of a limited fund class action on the basis of the defendant's possible insolvency not only exceeds the authority of the federal courts under Article III, but in the process also denies creditors the significant safeguards provided by Congress in the Bankruptcy Code. As the *Keene* court noted:

> [C]lass members in cases such as this would have no say in the conduct of the court-appointed class representatives, and unlike creditors in bankruptcy, are not able to vote on a settlement. *See* 11 U.S.C. § 1126. For them, it would be "cram-down" from start to finish. Finally, unlike a lawyer for a creditors' committee, the class representatives in matters like the present one may not be compensated unless a settlement is reached, a situation fraught with danger to the rights of plaintiffs.



*Keene*, 1993 WL 497538, at *6; *see also In re Joint Eastern & Southern District Asbestos Litig.*, 982 F.2d 721, 736 (2d Cir. 1992) (the differences between protections afforded under Rule 23 and the Bankruptcy Code "raise a substantial question whether a class action may be used to adjust claims against an insolvent entity").

Finally, use of Rule 23 to modify the rights of mass tort victims outside of bankruptcy denies them equal protection of the law by limiting the asset base from which those victims may recover without affecting the substantive rights of the defendant's other creditors. The Fifth Amendment contains an equal protection component that limits discrimination by the federal government just as the Fourteenth Amendment's Equal Protection Clause limits discrimination by the states. *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 542 n.21 (1987). Any application of Rule 23 that treats mass tort victims differently from other creditors is not rationally related to any legitimate governmental interest and therefore violates the equal protection component of the Fifth Amendment.

The *Ahern* class action that AIA urges this Court to preserve, like the class action rejected by the Second Circuit in *Keene* just two weeks ago, "is a self-evident evasion of the exclusive legal system established by Congress for debtors to seek relief." *Keene*, 1993 WL 497538 at *5. Contrary to the assertions of the AIA, use of the "limited fund" class action to resolve mass tort litigation is not cognizable under Rule 23 and would additionally violate constitutional principles of federalism and separation of powers. In deciding this case, the Court should

give no credence to the arguments of the insurance industry that Rule 23(b)(1)(B) provides a viable method of achieving global resolution of mass tort cases.

## CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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